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In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
GERALD P. NORTON,
Assistant to the Solicitor General,
EDMUND B. CLARK,
LARRY A. BOGGS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1a–52a) is reported at 489 F. 2d 390.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1974 (Pet. App. B, 53a–54a). The petition for a writ of certiorari was filed on May 20, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Clean Air Act, as amended, the Environmental Protection Agency must disapprove provisions of a state implementation plan that authorize the state to grant variances from the state plan during the period prior to the Act's deadlines for attainment of national ambient air quality standards, where such variances comply with the provisions of the Act concerning "revisions" of plans rather than those concerning "postponements" of plan requirements.

STATUTE INVOLVED

The Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857, *et seq.*, are set forth in relevant part in Appendix C to the petition (Pet. App. 55a–64a).

STATEMENT

On April 30, 1971, as required by the Clean Air Amendments of 1970, 84 Stat. 1679, 42 U.S.C. 1857 c–4(a)(1), the Environmental Protection Agency ("EPA") promulgated nationally-applicable ambient air[1] quality standards for specified pollutants. Such standards are of two general types: "primary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public health" (42 U.S.C. 1857c–4(b)(1)), and "secondary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 1857c–4(b)(2).

[1] Although not defined in the Act, "ambient air" means the portion of the atmosphere, external to buildings, to which the general public has access. See 40 C.F.R. 50.1(e).

On January 27, 1972, within the time prescribed by the Amendments (42 U.S.C. 1857c–5(a)(1)), the State of Georgia submitted to EPA its implementation plan. 40 C.F.R. 52.570(b). In accordance with EPA's guidelines for implementation plans (40 C.F.R. Part 51), the plan showed how Georgia will attain national primary and secondary ambient air quality standards within the statutory deadlines (the former as expeditiously as practicable, but in no case later than three years from the date of approval of the plan, and the latter within a reasonable time), and will maintain them thereafter, as required by 42 U.S.C. 1857c–5(a)(1) and (2)(A)(i)–(ii). On May 31, 1972, EPA approved Georgia's plan (with exceptions not here material). 37 Fed. Reg. 10859; 40 C.F.R. 52.572–52.574.

Within the time provided by the Amendments (42 U.S.C. 1857h–5(b)(1)), respondent Natural Resources Defense Council ("NRDC") and others petitioned the court of appeals for review of EPA's approval of the Georgia plan, claiming, *inter alia*, that the approval was invalid because a Georgia statute included in the plan (Ga. Code Ann. 88–912)[2] em-

[2] Section 88–912 reads in full:

"The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappro-

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powered the State Department of Public Health to grant variances from the plan in a manner contrary to the requirements of Section 110(f) of the Act, 42 U.S.C. 1857c-5(f).

That section permits EPA, in accordance with specified procedures, to approve postponements of the applicability of requirements of a plan to a particular stationary source or class of moving sources for up to

priate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing: Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification."

one year upon application of the governor. The court of appeals agreed with respondents and rejected EPA's contention that, during the period prior to the deadline for attainment of national primary standards (July 1975 for Georgia[3]), variances are not necessarily subject to Section 110(f) and rather may properly be treated as "revisions" of the plan, subject to EPA's approval under the less formal procedures of Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), where such variances would not interfere with timely attainment of the standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate issue in this case is whether a request for a variance[4] from a state's plan to implement air quality standards under the Clean Air Amendments of 1970 during the period prior to the state's deadline for the attainment of such standards is subject exclusively to the provisions of the Act concerning "postponements," as the court of appeals held, or whether EPA has properly construed the Act as permitting it to treat such variances as "revisions" of plans.

Under the revision procedures, the state is required to hold a public hearing, EPA may grant approval if the variance would not prevent timely attainment of

[3] The three-year period began to run in July 1972, when EPA approved, after revisions, the portions of Georgia plan that it had initially disapproved.

[4] We use the term "variance" generically to cover any postponement, amelioration, conditional permit, or other modification of an emission standard, compliance schedule, or other element of a state's implementation plan.

national standards, and its action is subject to judicial review. Under the postponement procedures, EPA itself must hold formal public hearings, it may approve a postponement (for up to one year) even if it would interfere with timely attainment of standards, but only if other specified conditions are satisfied, and its action is subject to judicial review.

While the question presented in this case involves construction of statutory language, that language should be construed in light of the background of the Clear Air Amendments and with an awareness of the complex structure of the Clean Air Act created by them—an Act designed to implement important national policy goals within a context of cooperative federalism.

1. The role of the federal government in efforts to control air pollution has grown steadily over the past two decades through a series of measured steps that reflect certain inherent dimensions of the problem. These include: its interstate nature, polluted air being mobile and not confinable within the boundaries of a state; the advantage, in terms of availability of resources and avoidance of duplication, of having certain actions taken on the national level; the practical desirability of leaving both the adaptation of general standards to particular circumstances and the enforcement of measures adopted to achieve such goals to state and local governments, whose personnel are ordinarily closer to the physical sources of pollution and those affected by it and by the measures needed to reduce it; and the desirability, in our federal system, of avoiding where possible an extensive federal law enforcement apparatus.

Thus, in 1955, Congress authorized the Surgeon General, under the supervision of the Secretary of Health, Education, and Welfare ("the Secretary"), to study the problem of air pollution, to provide technical assistance (*e.g.*, investigations, research, surveys) to state and local governments trying to abate pollution, and to make grants-in-aid for research, training and demonstration projects. 69 Stat. 322–323. In 1960, Congress directed the Surgeon General to conduct a study concerning the health hazards resulting from motor vehicle emissions. 74 Stat. 162.

In the Clean Air Act of 1963, 77 Stat. 392–401, Congress authorized the Secretary to expand research concerning air pollution and to work with the states to develop uniform laws to prevent and control such pollution. Although federal authorities were empowered to intervene directly to abate interstate pollution in limited circumstances (77 Stat. 396–399), the Act explicitly left the primary responsibility in this field with state and local governments. Congress amended the 1963 Act in adopting the Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992–996, which authorized the Secretary to establish federal standards to control motor vehicle emissions, and again in 1966 to increase the Secretary's authority to make grants to state air pollution control agencies. 80 Stat. 954–955.

Convinced "that air pollution is a threat to the health and well being of the American people" (H.

Rep. No. 728, 90th Cong., 1st Sess., p. 3), Congress enacted a still more comprehensive statute, the Air Quality Act of 1967. 81 Stat. 485–507. This law reiterated the congressional premise of the Clean Air Act "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *." 81 Stat. 485, 42 U.S.C. 1857(a)(3). Accordingly, while the Secretary was required to designate air quality control regions and to issue criteria of air quality required to protect the public health and welfare, the states were given the responsibility to adopt ambient air quality standards for those regions, as well as to adopt implementation plans to maintain and enforce their standards. State standards and plans both had to be approved by the Secretary, who, if a state failed to comply, could promulgate federal standards and plans for that state. Where action reasonably calculated to secure abatement of violations of the air quality standards was not taken, the Secretary could, if the health or welfare of persons in another state (or, in some circumstances, another country) was endangered, request the Attorney General to bring suit to abate the pollution source. 81 Stat. 490–497.

2. Dissatisfied with the rate of progress under the 1967 Act,[5] and responding to heightened concern about

[5] By 1970, only ten state standards had been approved, and, while state implementation plans had been submitted to the Secretary, none had yet been approved. As a result, there had been no federal enforcement under the 1967 Act and only one enforcement action litigated since 1963. 116 Cong. Rec. 32914–32916; see *United States* v. *Bishop Processing Co.*, 423 F. 2d 469 (C.A. 4), certiorari denied, 398 U.S. 904.

air pollution and other environmental problems, Congress substantially revised the Clean Air Act in enacting the Clean Air Amendments of 1970. 84 Stat. 1676. A fundamental feature of the Amendments was the adoption of fixed deadlines for the accomplishment of specified statutory objectives concerning air quality throughout the country, although the states were accorded substantial latitude in devising strategies for meeting the statutory goals in accordance with a timetable established by the Amendments, subject to guidelines adopted and implemented by EPA.[6]

More specifically, the pertinent features of the Amendments are as follows. First, based upon air quality criteria already adopted pursuant to the 1967 Act or subsequently adopted, EPA was ordered, within 30 days of the enactment of the Amendments on December 31, 1970, to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards (see p. 2, *supra*); after 90 days for comments, EPA was then obliged to promulgate such standards. 42 U.S.C. 1857c–4(a)(1). Second, after EPA's promulgation of standards, each state was required, after public hearings, to adopt and submit to EPA a plan for the implementation, maintenance and enforcement of these national

[6] While a House-Senate conference committee was resolving differences between bills passed by the respective houses, the President created EPA and vested in it the powers and responsibilities of the Secretary under the Clean Air Act and other legislation. Reorganization Plan No. 3 of 1970. (35 Fed. Reg. 15623), 84 Stat. 2086. Accordingly, the amendments vested enforcement authority in the Administrator of EPA. See H. Conf. Rep. No. 91–1783, 91st Cong., 2d Sess., p. 42.

standards. 42 U.S.C. 1857c–5(a)(1). Third, EPA was required, within four months of submission, either to approve or disapprove each state implementation plan. 42 U.S.C. 1857c–5(a)(2).[7]

The Amendments list eight conditions that EPA must find satisfied before it may approve a plan. One requirement is that the state's implementation plan provide for attaining the primary national ambient air quality standard "as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan," unless EPA, upon application of the Governor made when the plan was submitted, extends this time for not more than two years (42 U.S.C. 1857c–5(a)(2)(A)(i) and (e)); secondary standards must be attained within a "reasonable" time. 42 U.S.C. 1857c–5(a)(2)(A)(ii). A further requirement is that the plan include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard * * *." 42 U.S.C. 1857c–5(a)(2)(B).

In addition, Section 110(a)(3) authorizes EPA to approve "revisions" in state implementation plans so long as they conform to the requirements of the Act for the plans themselves. 42 U.S.C. 1857c–5(a)(3). Beyond the authority to approve revisions, Section 110(f) empowered EPA under specified circumstances

[7] If a state declines to submit a plan or to revise its plan to the extent that it has been disapproved, EPA is authorized to prepare and promulgate such a plan or portion thereof. 42 U.S.C. 1857c–5(c).

to "postpone" any requirement of an implementation plan "[p]rior to the date on which any stationary source or class of moving sources is required to comply * * *." 42 U.S.C. 1857c–5(f)(1). Revisions and postponements both require EPA's approval, which is subject to judicial review (42 U.S.C. 1857c–5(f)(2)(B), 1857h–5(b)(1)), and both must be preceded by the opportunity for a public hearing, to be conducted by the state in the case of a revision and by EPA in the case of a postponement. The Act specifically requires that the latter type of determination be made on the record, based on a fair evaluation of the entire record at the hearing, and that it include detailed findings and conclusions. 42 U.S.C. 1857c–5(f)(2)(A).

3. In substantially revising the approach to be taken by the federal government and the states in combating together the problem of air pollution, the Clean Air Amendments of 1970 thus imposed on newly-created EPA and the states, under a complex statutory scheme, a variety of substantial obligations to be met within specified deadlines. One of the many issues EPA was required to resolve at the outset concerned the procedures to be followed if a state chose to make some or all of the general requirements of its implementation plan more stringent than the standards required, or to make them effective prior to the statutory deadline for attainment of national ambient air quality standards, but also desired to authorize variances that would not interfere with the state's timely attainment of those standards. EPA concluded that such revisions could be treated as "revisions" of plans

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under Section 110(a)(3) of the Act, while variances that would affect attainment or maintenance of national standards by or after the deadline would be treated as "postponements" under Section 110(f).

Accordingly, when EPA promulgated guidelines for the preparation of state implementation plans in 1971, it took the position, with the concurrence of NRDC (see p. 31, *infra*), that Section 110(f) of the Act did not apply exclusively to all exceptions or variances, but only to those that would affect the ability of a state to attain within the statutory timetable, and thereafter maintain, the national standards; variances that would not have such an effect were to be treated as revisions under Section 110(a)(3). 36 Fed. Reg. 22400, 22405; 40 C.F.R. 51.6, 51.32(f).

Relying on EPA's authoritative interpretation of the Act concerning variances, Georgia and other states adopted implementation plans effective immediately or well before the deadlines for attainment of national standards, with the intention of granting variances or exceptions to specific sources that could not feasibly be brought into immediate compliance. These states proposed to defer applicability only where necessary, by placing excepted sources on expeditious but reasonable compliance schedules which would provide for attainment of the national standards by the mandatory compliance date, which for Georgia is July 1975 for both primary and secondary standards. Other states, such as Florida, made their requirements effective at the latest possible date allowed by the Clean Air Act—generally mid-1975.

Such states would therefore normally have no need to grant variances prior to the mandatory compliance dates.

4. In review proceedings initiated by respondent NRDC, the Courts of Appeals for the First [8] and Eighth [9] Circuits (later joined by the Second [10] and Ninth)[11] held that EPA had properly construed Section 110 as authorizing it to treat some variances other than as postponements under Section 110(f), at least insofar as the variance pertained to the period prior to the deadline for attainment of the national standards. Most of these courts also held, however, that a variance pertaining to the post-attainment period was, with limited exceptions, subject to the procedures pertaining to postponements, even if the particular variance did not threaten the state's ability to attain and maintain national standards.

Accepting the distinction drawn by the courts between pre-deadline and post-deadline variances as a reasonable interpretation of the Act, albeit less desirable than its own interpretation, EPA amended its guidelines to reflect this distinction and to conform with the rulings in those cases concerning the pre-

[8] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F. 2d 875 (C.A. 1).

[9] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F. 2d 690 (C.A. 8).

[10] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F. 2d 519 (C.A. 2).

[11] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974.

attainment period. 39 Fed. Reg. 34533–34535; 40 C.F.R. 51.11(g), 51.15(d), 51.32(f).[12]

5. In the present case the court of appeals disagreed with the other circuits and concluded (Pet. App. 25a–27a):

> We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88–912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c–5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c–5(e) for a possible two-year extension of the deadline in sharply restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement *of standards.*" 478 F. 2d at 887 (emphasis supplied).
>
> This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of

[12] At the same time, EPA disapproved *pro tanto* all provisions of plans, including the Georgia plan, that permitted variances to defer compliance beyond the deadlines for attainment of national standards. 39 Fed. Reg. 34535; 40 C.F.R. 52.26.

> *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived. We think that the provisions of section 1857c–5(a)(2)(A)(i) and section 1857c–5(e) do not provide *any* support for the latter conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above: that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.
>
> Thus we hold that it was inconsistent with the statute for Georgia to adopt its own variance procedures, and that the Administrator exceeded his authority in approving section 88–912. Accordingly, we direct the Administrator to publish forthwith his disapproval of section 88–912.

6. It is our submission that the court of appeals' decision rests upon a misreading of the statutory language and its history, and a misapprehension of the structure and purposes of the Clean Air Act. In providing EPA in Section 110(f) with authority to postpone deadlines in accordance with burdensome and relatively stringent statutory requirements, Congress

was plainly concerned with providing a limited means for dealing with sources unable to comply with the requirements of state plans by the deadlines for attainment of national standards. That, of course, does not mean that Section 110(f) should be construed as providing the only means for relief from any requirement of a state plan at any time, even if the general requirement had been made more stringent, or effective sooner, than was needed to attain such standards. To the contrary, such a reading, if adopted by EPA at the outset, would very likely have resulted overall in less ambitious requirements and commitments than many states adopted or required.

The principal conclusion of the court of appeals that, as contended by NRDC, Section 110(f) provides the exclusive means for obtaining variances from requirements of a state plan prior to the deadline for attainment, has now been rejected by the other four courts of appeals that have considered the question. Those courts have recognized the need and authority under the Act for a measure of flexibility not afforded by the postponement procedures of Section 110(f), particularly in the pre-attainment period. Indeed, all of the other courts of appeals have, albeit to differing degrees, acknowledged some variance authority apart from Section 110(f) in the post-attainment period.

7. If sustained, the decision below would have severe adverse consequences for EPA in its efforts to administer and enforce effectively its manifold statutory responsibilities. One possibility is that EPA would itself be required to hold formal public hearings concerning many of the thousands of variances already granted by states—after public hearings held by the state—and approved by EPA. In addition, invalidation of EPA's 1971 interpretation of the Act at this time would be seriously unfair to the states and other persons subject to the Act who have relied in good faith on that interpretation—once endorsed by NRDC itself (see p. 31, *infra*) in formulating and responding to control strategies.

ARGUMENT

VARIANCES FROM STATE IMPLEMENTATION PLANS THAT DO NOT AFFECT ATTAINMENT OF NATIONAL STANDARDS WITHIN THE STATUTORY DEADLINES OR THEIR MAINTENANCE THEREAFTER NEED NOT BE TREATED BY EPA AS "POSTPONEMENTS" OF THE REQUIREMENTS OF STATE PLANS.

The decision of the court of appeals in this case set aside a reasonable construction of the Clean Air Amendments made by the agency responsible for implementing the Amendments and sustained by all other courts of appeals that have considered the question, *viz.*, that the provisions of Section 110 (f) of the Act concerning postponements are not the sole means by which a state may grant a variance from the requirements of its implementation plan. That decision is not compelled or supported by the language of the Amendments or their legislative history, or by the overall structure and purpose of the Clean Air Act. Moreover, the court of appeals' construction of the Amendments would have unwarranted adverse con-

sequences for EPA, the states, and the persons subject to the Act.

A. EPA'S TREATMENT OF VARIANCES NOT AFFECTING ATTAINMENT OF AIR QUALITY STANDARDS WITHIN THE PRESCRIBED DEADLINE AS NOT BEING GOVERNED EXCLUSIVELY BY SECTION 110(F) IS CONSISTENT WITH THE LANGUAGE, STRUCTURE AND LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS

Under the statutory scheme created by the Clean Air Amendments, within nine months after EPA's promulgation of primary and secondary national ambient air quality standards (*i.e.*, by January 31, 1972), each state, after holding public hearings, was required to submit to EPA a plan providing for the implementation, maintenance, and enforcement of such standards in the state. EPA was required by Section 110 (a)(2) to approve each state plan within four months of the deadline for submission if it had been adopted after public hearings and if it satisfied eight general conditions. The first condition was that the plan provide for the attainment of the national primary ambient air quality standards it was implementing "as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan," and for the attainment of secondary standards within "a reasonable time." 42 U.S.C. 1857c–5(a)(2)(A) (i) and (ii). Other conditions require that the plan include specified categories of control measures (*e.g.*, emissions limitations, compliance schedules) and procedures (*e.g.*, provisions for intergovernmental cooperation; reports on emissions; revisions to take account of changes in the national standards). 42 U.S.C. 1857c–5(a)(2)(B)–(H).[13]

[13] Section 110(a)(2) provides that EPA shall not approve a plan unless:

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such re-

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The Amendments provided three means to alter deadlines imposed by Section 110 or a plan promulgated thereunder. If it appeared at the outset that certain sources would not be able to comply with the requirements of a plan to meet a primary standard within the three-year period, the Governor of a state could request when submitting an implementation plan, and EPA was authorized to grant, an extension of the statutory deadline for up to two years for such sources, in accordance with the requirements of Section 110(e).[14] Georgia sought no such extension, and that provision is not in issue in this case.

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ports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303 [42 U.S.C. 1857h–1], and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

[14] Section 110(e) authorizes EPA to approve an extension if it determines that (42 U.S.C. 1857c-5(e)):

* * * * * * *

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not

Second, the state is authorized to make "revisions" in compliance schedules or any other aspect of an approved implementation plan, and, under Section 110(a)(3), EPA is authorized to approve such revisions if they have been adopted by the state after public hearings and they meet the requirements of Section 110(a)(2) for implementation plans themselves, including, of course, the requirement of attaining national standards within the pertinent deadlines. 42 U.S.C. 1857c–5(a)(3). EPA's approval of an implementation plan is explicitly made subject to judicial review in a court of appeals by a provision (42 U.S.C. 1857h–5(b)(1)) which EPA regards as equally applicable to its approval of revisions of plans.

Third, prior to the date on which any stationary source or class of moving source is required to comply with a requirement of an implementation plan, the Governor may apply for, and EPA may grant, a "postponement" of such deadline under Section 110

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available or will not be available soon enough to permit compliance within such three-year period, and

(B) The State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved [and]

(2) * * * the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f), 42 U.S.C. 1857c–5(f). While the Act does not require that the state afford an opportunity for a public hearing before requesting a postponement, as it must with a revision of a plan, Section 110(f) does require that EPA itself hold a formal public hearing, and that its decision be based on the record of that hearing and be accompanied by detailed findings and conclusions. 42 U.S.C. 1857c–5(f)(2)(A). Moreover, although the decision to grant a postponement, unlike a revision, is not subject to the three-year deadline and other requirements of Section 110(a)(2) pertaining to implementation plans, postponements are subject to several conditions[15] similar to those pertaining to requests for extension of the three-year deadline under Section 110(e) (see pp. 20–21, *supra*, n. 14), and a postponement may be granted "for not more than one year." 42 U.S.C. 1857c–5(f)(1). The decision to grant a postponement is also subject to judicial review in a court of appeals. 42 U.S.C. 1857c–5(f)(2)(B).

[15] Under 42 U.S.C. 1857c–5(f)(1), EPA is required to approve a postponement if it determines that:

> (A) good faith efforts have been made to comply with such requirement before such date, (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time, (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and (D) the continued operation of such source is essential to national security or to the public health or welfare * * *.

The legislative history of the Clean Air Amendments provides limited but useful guidance in applying the pertinent provisions of this complex legislation to the present issue. Briefly, the Senate had passed a bill far more rigorous than the bill earlier passed by the House, and the conference committee produced in the waning days of the 91st Congress a compromise bill that differed in many substantial respects from either the Senate or House bill, while giving only a relatively truncated explanation of the new bill.

The House-passed bill (H.R. 17255, 91st Cong., 2d Sess.; H. Rep. No. 91–1146, 91st Cong., 2d Sess.) adhered rather closely to the then-existing provisions of the Clean Air Act as amended by the Air Quality Act of 1967 (see p. 8, *supra*). Most significantly, the bill did not establish a fixed deadline for attaining national ambient air quality standards promulgated by the Secretary,[16] and so had no pertinent provisions for extensions, revisions or postponements of deadlines.[17]

Section 110 of the Senate bill (S. 4358, 91st Cong., 2d Sess.; S. Rep. No. 91–1196, 91st Cong., 2d Sess.), passed by the Senate as an amendment to the House bill, provided for the promulgation within 30 days of national ambient air quality "standards" concerning

[16] EPA had not yet been created (see p. 9, *supra*, n. 6).

[17] Under the House bill, the Secretary was required to issue proposed national ambient air quality standards within 30 days and to promulgate such standards within a "reasonable time" after receiving comments on the proposals. States were required to submit implementation plans within 240 days of promulgation of the standards, but the plan need only have assured achievement of the standards "within a reasonable time."

health of persons and "goals" concerning public health and welfare (corresponding generally to primary and secondary standards under the final amendments). Under Section 111 of the Senate bill, each state was required within nine months thereafter to submit an implementation plan, which the Secretary was required to approve within four months if the plan satisfied ten specified conditions, including a requirement that it provide for the attainment of national standards within three years (there being no requirement to attempt to attain such standards sooner if practicable).

The bill did not provide for extension of the three-year deadline for attaining national "standards," although it did authorize the Secretary, where he determined it to be necessary, to extend the deadline for submission of a plan to implement national "goals" for up to eighteen months. The bill contained no counterpart to Section 110(a)(3) authorizing EPA to approve revisions in approved plans.[18]

Section 111(f) of the Senate bill, however, did provide that no later than one year before the deadline for attainment of a national standard the Governor of a state could petition a three-judge district court for relief from the expiration of the deadline as to a region or persons, and the court would be authorized to grant such relief, for up to one year, only if specified conditions were satisfied, which conditions were similar to those now contained in Section 110(f) (see

[18] Section 111(a)(2)(I) of the bill contained limited authority for revisions to take account of changes in the standards or goals promulgated by the Secretary or of changes in the availability of methods for attaining them.

p. 22, *infra*, n. 15).[19] See also S. Rep. No. 91-1196, *supra*, at pp. 14–15.

The conference report (H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess.), after summarizing the respective provisions of the House bill and the Senate amendment thereto, stated (*id.* at 45):

> The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented. The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors.

[19] The court was authorized to grant a postponement only after (1) determining that such a relief is essential to the public interest and the general welfare of the persons in the region affected, and (2) finding

> (A) that substantial efforts have been made to protect the health of persons in such region; and
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> (B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or
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> (C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 118 of this Act.

Section 118 of the bill, like Section 118 of the Act, 42 U.S.C. 1857f, authorized the President to exempt Federal properties from compliance with certain requirements of the Act if he determined it "to be in the paramount interest of the United States to do so."

To this brief explanation, Senator Muskie, the primary author of the Senate bill, added the following comments in a Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970 (116 Cong. Rec. 42384–42385; emphasis supplied):

> If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of *the deadline* up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension.
>
> A Governor may also apply for a postponement of *the deadline* if, when *the deadline* approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such postponement is subject to judicial review.

Neither the conference report nor Senator Muskie's Summary discussed the addition of Section 110(a)(3).

In sum, the language of the Amendments and their history strongly suggest that Section 110(f) was not intended to be the exclusive means of obtaining variances from a requirement of a state plan where the variance woud not affect timely attainment or maintenance of national ambient air quality standards. Rather, Section 110(f) was aimed at post-

ponements that would affect a state's attainment of national standards within the prescribed deadlines; lesser variances, like other revisions of plans, could be approved by EPA pursuant to Section 110(a)(3).

B. EPA'S CONSTRUCTION OF THE ACT, ON WHICH THE STATES AND PERSONS SUBJECT TO THE ACT HAVE RELIED, PROPERLY EFFECTUATES THE LEGISLATIVE PURPOSE OF THE AMENDMENTS.

The Clean Air Amendments imposed upon newly-created EPA an ambitious legislative goal, a variety of substantial legal and technical obligations, and an unprecedented series of deadlines to meet in carrying out its statutory mandate under this comprehensive and complex legislation. While it was completing the first phase—promulgation of national air quality standards on April 30, 1971—EPA was also working towards the next stage—submission of state implementation plans. To assist the states in determining what it would regard as satisfying the requirements of Section 110(a)(2), in the spirit of cooperative federalism on which the Act is still based (42 U.S.C. 1857(a) (3) and (4)), EPA on April 7, 1971, published proposed guidelines for the preparation, adoption and submission of such plans. 36 Fed. Reg. 6680. After receiving comments by numerous organizations, including respondent NRDC, EPA issued final guidelines on August 14, 1971. 36 Fed. Reg. 15486; 40 C.F.R. Part 51.

One of the many questions of statutory interpretation to be resolved during the period in which the implementation plans had to be prepared, submitted and approved concerned the scope and relationship of

EPA's authority to approve "revisions" of plans under Section 110(a)(3) and "postponements" under Section 110(f), particularly as they related to compliance with control measures made effective prior to the deadline for attainment of national standards.

In light of the legislative history of Section 110(f), which indicated that it was aimed primarily at requests for relief arising after a plan was submitted that would affect attainment of the national standards within the three-year deadline,[20] EPA concluded that Section 110(f) had not been intended by Congress as the exclusive means of relief from requirements of plans when the compliance problems involved had not been accommodated by an extension of the deadline pursuant to Section 110(e) and would not prejudice the state's timely attainment of the standards. This conclusion is supported by several pragmatic considerations.

First, since Section 110(f) requires that formal hearings be held by EPA (cf. 38 Fed. Reg. 22025–22030, 27286–27287; 40 C.F.R. 51.33), in addition to any hearings held by the state, an overly-broad application of the postponement procedure could result in an enormous burden upon EPA, with consequent delays and diversion of resources needed for other vital

[20] In the original Senate bill the postponement provision explicitly applied only to the statutory deadline for attainment of national standards (see p. 24, *supra*), and the comments in the conference report and Senator Muskie's explanation of the conference bill do not suggest a substantially broader focus (see pp. 25–26, *supra*). See Luneburg, *Federal-State Interaction under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 656 (1973).

aspects of EPA's work under the Act. Insofar as requests for relief were subject to the "revision" requirements, however, the burden of conducting public hearings was diffused among the affected states.

In addition, if a state were authorized to grant variances from the requirements of its plan prior to the statutory deadline only by resort to the postponement procedures of Section 110(f), it might well be inclined to defer the effective dates of its control measures until the latest feasible date consistent with attainment of the standards within the statutory deadline, rather than to make some or all control measures effective soon in the expectation that needed variances could be granted during the period prior to the deadline. Such a decision by a state to defer deadlines might reflect apprehension that the postponement procedures would be too slow and stringent to provide adequate relief during the preattainment period, as well as the belief that a postponement could be granted only for one year[21] and so could not adequately protect a source subject to a requirement made effective

[21] While the issue is not presented in this case, a question exists as to whether Section 110(f) permits only one postponement, since the Act does not explicitly authorize or prohibit successive postponements. The provision of the Senate bill on which Section 110(f) was largely based did explicitly permit multiple postponements of the deadline for attainment of a standard, but the omission of this seemingly significant language was not commented on in the conference report or the explanatory statement submitted by Senator Muskie (see pp. 25–26, *supra*).

at a date earlier than one year before the statutory deadline.[22]

Similarly, if Section 110(f) were the only means for obtaining variances from any requirement of a state plan, the states might be deterred from adopting control strategies more stringent than those needed merely to attain and maintain national standards, which Section 116 of the Act specifically permits them to do. 42 U.S.C. 1857d–1.

Accordingly, in light of the statutory mandate that the national standards should be attained "as expeditiously as practicable" within the three-year deadline, EPA adopted a construction of the Amendments that reasonably led towards that goal. Thus, EPA's proposed and final guidelines provided that a state's determination to defer the applicability of any portion of its control strategy in its plan to a source would be subject to the requirements for a postponement if the "deferral will prevent attainment or maintenance of a national standard" within the prescribed time (36 Fed. Reg. 6686, 22405; 40 C.F.R. 51.32(f)), although

[22] For example, Georgia and other states (see, *e.g.*, Pet. 6) made many requirements of their plans effective immediately in 1972, subject to relief under stringent variance procedures. This way most sources were subjected to controls long before the 1975 deadline, even though, as was recognized at the outset, some might require variances for most or all of the three-year period. A one-year postponement would not always help such a source, even if available, as the source might then be in violation for the balance of the three-year period. This problem would have been avoided if the state had deferred the effective date of all requirements under the plan until the attainment deadline (as Florida and others have done), thereby in effect basing overall controls on the lowest common denominator.

such a determination would be treated as a "revision" of the plan if it would not have that effect. See 36 Fed. Reg. 6681, 22400; 40 C.F.R. 51.6.

Neither respondent NRDC nor anyone else objected to this provision. Indeed, at subsequent congressional hearings concerning EPA's implementation of the Clean Air Amendments, held before EPA had approved the state plans, NRDC stated that Section 110(f) applied to "any variance which would prevent attainment * * * of a national standard * * *" and that the EPA guideline "correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of the plan * * *." Hearings, on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I), before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., ser. no. 92–H31, p. 45 and n.51 (statement of Richard E. Ayres).

On the basis of EPA's then-unchallenged guidelines, Georgia and other states submitted implementation plans containing early effective dates and limited provision for variances. Such plans were approved by EPA in this regard—in many instances without challenge—and commitments and investments have been made by various sources in such states, and the states themselves, in reliance upon EPA's interpretation of the Act as permitting variances during the pre-attainment period subject to the procedures for "revisions" of plans.

Where, as here, EPA's interpretation of the "untried and new" provisions of the Amendments it was responsible for implementing "is not unreasonable," the language of the statute bears EPA's construction, that interpretation has "been a matter of public record," and there has been action by others, "at very great expense, in reliance upon the * * * interpretation," it should be shown "great deference" and sustained. *Udall* v. *Tallman,* 380 U.S. 1, 16–18; see, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433–434; *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 210.

C. THE CONTENTION THAT SECTION 110(F) PROVIDES THE EXCLUSIVE MEANS FOR OBTAINING VARIANCES PRIOR TO THE DEADLINE FOR ATTAINING NATIONAL STANDARDS HAS BEEN REJECTED BY CONGRESS AND ALL OTHER COURTS OF APPEALS

The reasonableness of EPA's interpretation of the Act concerning the treatment of variances, and the validity of EPA's approval of the Georgia procedure in issue here, are both supported by the unsuccessful efforts of respondent NRDC to challenge them elsewhere.

At congressional hearings in 1972 concerning EPA's implementation of the Clean Air Amendments, NRDC specifically singled out the Georgia variance statute involved here as being an "extreme" example of provisions in state plans that NRDC believed to be inconsistent with the requirements of Section 110(a)(2). Hearings on Implementation, *supra,* at 45. Congress, however, took no action, either before or after EPA's approval of the Georgia plan, that would in

any way suggest that Georgia or EPA was not correctly carrying out the intent of Congress.

Moreover, after EPA had approved a number of state plans containing provisions for variances that, consistent with EPA's guidelines, need not in all cases satisfy the requirements of Section 110(f) for postponements, respondent NRDC challenged EPA's approvals of several such plans on various grounds. Apparently having changed its position (see p. 31, *supra*), NRDC contended that Section 110(f) "establishes the exclusive variance procedure." *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 478 F. 2d 875, 884 (C.A. 1) (*"NRDC–C.A. 1"*). However, four of the five courts of appeals that have considered that claim have rejected it.

In *NRDC–C.A. 1,* involving challenges to EPA's approval of the Massachusetts and Rhode Island plans, the First Circuit concluded that "Congress [had not] intended altogether to preclude the Administrator [of EPA] from approving plans containing reasonable state deferral mechanisms during the preliminary [pre-attainment deadline] period." *Id.* at 887. The court stated (*ibid.*):

> A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c–5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language § 1857c–5(a)

> (2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

While not rejecting EPA's contention that such power was conferred by the revision authority of Section 110(a)(3), the court viewed "it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period." *Ibid.*

As to the period *after* the deadline for attainment of national standards, however, the court concluded that a variance would ordinarily have to satisfy the requirements of Section 110(f) for postponements, which the court regarded as "the exclusive mechanism for hardship relief after the mandatory attainment dates." 478 F. 2d at 886. Nevertheless, recognizing a need for "flexibility" not afforded by Section 110(f) for such matters as "mechanical breakdowns and acts of God," the court added that a state plan may provide "for minor state and local deferral procedures" during the post-attainment period, if limited to a few months and containing standards and controls to preclude abuse. *Ibid.*[23]

[23] Since the Court granted certiorari in the present case, the Ninth Circuit has more broadly upheld EPA's interpretation of the Act, as reflected in the guidelines, that all variances need not satisfy the requirements of Section 110(f) for postponements. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974. That court specifically rejected the distinction drawn by the First Circuit between the periods prior to and after

Regarding the First Circuit's construction of the Act as a reasonable, workable one, albeit less desirable

the deadlines for attainment of national standards as having no foundation in the language of Section 110 or its history (see Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M.L. Rev. 324, 331 (1973)), and concluded that the power of EPA to approve "minor" variances (*i.e.*, those that will not interfere with attainment or maintenance of national standards), is a necessary adjunct of the statutory scheme both before and after the attainment dates, without reliance upon the revision authority of Section 110(a)(3).

Moreover, the First Circuit's contrary conclusion is not supported by the legislative history on which it relied in stating (478 F. 2d at 885-886):

> It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments. Report No. 91-1146, U.S. House of Representatives, 91st Cong. 2d Sess., pp. 1, 5 (1970) * * * The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down. Report No. 91-1196, U.S. Senate, 91st Cong. 2d Sess., p. 3 (1970).

The House report cited was commenting upon the House bill which, as noted (see p. 23, *supra*), did not contain explicit mandatory deadlines for attainment of emission standards or ambient air standards; nor did the House report indicate that "specific emission standards" could not be relaxed by joint federal-state action even where there would be no adverse affect upon attainment or maintenance of national ambient air standards. Similarly, the Senate report did not suggest that sources must close down if they cannot meet the *emission* standards or other elements of a state's control strategy. Rather, the report's statement that the sources "either should meet the standard of the law or be closed down * * *" (S. Rep. No. 91-1196, *supra*, at 3) plainly has reference to the ambient air standards the report had just been discussing. *Id.* at 2-3. Nothing in the legislative history is inconsistent with the proposition that the variances from requirements of a state

than EPA's original construction, EPA did not ask this Court to review the First Circuit's decision and instead changed its regulations concerning the plans involved to conform to that decision. See 38 Fed. Reg. 18878–18880; 40 C.F.R. 52.1131, 52.2079. Later, EPA's general guidelines were themselves changed to reflect this interpretation, and EPA disapproved all state plans to the extent that they "permit the deferral of compliance with applicable plan requirements beyond the statutory attainment dates * * *." 39 Fed. Reg. 34535; 40 C.F.R. 52.26(a).

The First Circuit's decision was followed by the Eighth Circuit (*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F. 2d 690, 693–694 (C.A. 8) (Iowa plan)) and the Second Circuit (*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F. 2d 519, 523 (C.A. 2) (New York plan)), neither decision resting upon any new analysis, and the latter expressly rejecting the reasoning of the court of appeals in this case (*ibid.*).

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plan are permissible, apart from Section 110(f), if attainment or maintenance of national ambient air standards would not be affected.

Nor was the First Circuit's conclusion supported by its concern that to permit variances to be obtained other than as postponements under Section 110(f) would "invite protracted delay." 478 F. 2d at 886. While a source might well seek to litigate whether a variance in its favor would prevent attainment or maintenance of a national standard, the source would remain subject to the applicable requirements until a variance or revision were approved by both the state and EPA. Cf. *Getty Oil Co.* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017–1019 (D. Del), remanded on other grounds, 467 F. 2d 349 (C.A. 3), certiorari denied, 409 U.S. 1125.

Most recently, EPA's position that Section 110(f) is not the exclusive procedure governing variances, at least in the pre-attainment period, has been sustained by the Ninth Circuit, which, like the First Circuit, held that a sensible construction of the Act required that EPA be authorized, without using the procedures and standards of Section 110(f), to approve "minor" variances, *i.e.*, those not affecting attainment or maintenance of national standards. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72–2145 (C.A. 9), decided November 11, 1974, slip op. pp. 5–13 (Arizona plan). Moreover, the court held that this authority was not limited to the pre-attainment period (see p. 34, *supra*, n. 23).[24] The court stated that if EPA lacked authority to approve such minor variances apart from Section 110(f), it would be "difficult to perceive any just basis for the Act's exhortation to the states to promulgate implementation plans even stricter than that required to attain national ambient air standards. See 42 U.S.C. § 1857d–1." Slip Op. p. 9.[25] Disagreeing with the decision of the court of appeals in the instant case, the Ninth Circuit could find no "congressional intent to establish section 110(f) as the exclusive mechanism by

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[24] Indeed, the court stated that its interpretation of the Act precludes EPA's rejection of a state plan on the ground that it permits "the issuance of 'minor' variances under a procedure other than that specified in section 110(f)." Slip Op. p. 13 (footnote omitted).

[25] NRDC has elsewhere acknowledged that under the Act "States are not only free but encouraged to set tighter standards and reach these standards at an earlier date than required by Federal law." Hearings on Implementation, *supra*, at 17.

which all changes of particular application may be accomplished." *Id.* at 12.

D. THE DECISION OF THE COURT OF APPEALS RESTS UPON AN ERRONEOUS ANALYSIS OF THE LANGUAGE AND PURPOSE OF THE CLEAN AIR ACT.

The court of appeals' conclusion that Section 110(f) is the exclusive procedure governing variances stems, first, from a serious misreading of the language of Section 110(f). Noting that Section 110(f) provides that a postponement may be granted with respect to the date that "any" source must comply with "any" requirement of a state plan, the court erroneously concluded that Section 110(f) is the exclusive procedure governing "*all* particular changes" in the applicability of the requirements of a plan (Pet. App. 21a–22a; emphasis in original). Howe r, especially in light of other provisions of the Act, this language in Section 110(f) is more persuasively read as merely authorizing postponements as to "any" requirement, but not mandating that all modifications of such requirements necessarily be treated as postponements subject to Section 110(f).

Second, in asserting that nothing in the Act supports the construction of Section 110(f) as not applying to a variance that does not threaten attainment of a national standard (Pet. App. 21a), the court gave no weight to the authority in the Act concerning revisions. The court erroneously disposed of the revision provision of Section 110(a)(3) with the *ipse dixit* that there was a "familiar and clear" distinction between a revision, which "is a change in a

generally applicable requirement," and a postponement or variance, which is "a change in the application of a requirement to a particular party" (*ibid.*). In adopting this distinction, for which it cited no authority, the court ignored the legislative history indicating that the use of the term "postponements" in Section 110(f) had reference primarily to deadlines for attaining national standards, and it gave no weight, let alone deference, to the interpretation of EPA, the agency responsible for implementing the Act.

The court's other premise was "that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need" (Pet. App. 26a; see *id.* at 22a–23a). The court's conclusion, however, does not follow from that premise. As suggested above (see pp. 29–30, 33–34, 37, *supra*), one significant means of securing "ambitious commitments at the planning stage" was for states to make their plans more stringent than needed to attain national standards or generally effective at an earlier date than required for timely attainment of those standards, providing for exceptions in cases of real hardship. Since an excepted source could not rely on the continuation of such an exception past the attainment deadline, it would be no better off than if the state had deferred effective dates until the latest date, an approach that might well have tended to produce less

ambitious overall commitments at the pre-attainment planning stage.

Finally, the court of appeals took issue with the statement of the First Circuit in *NRDC–C.A. 1* that "provision for a three-year grace period, followed by the possibility of a further two-year extension [under Section 110(e)], indicates that Congress did not expect immediate achievement of standards." 478 F. 2d at 887. The court below stated (Pet. App. 26a):

> This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived.

While it may not follow merely from these provisions that Congress did not contemplate that emission standards (or other aspects of a state's control strategy) would not have to be met as their scheduled dates arrived, it also does not follow that Congress intended such dates to be as inflexible as sole reliance on Section 110(f) as the means of change would leave them, in cases where compliance presented severe interim problems and an *ad hoc* relaxation of the standard would not interfere with the state's attainment or maintenance of national standards. To the contrary, while the Act as a whole gives the states no discretion concerning the national ambient standards to be promulgated by EPA, they were accorded substantial

latitude in determining the precise emission standards or other elements of the control strategy to be used in attaining and maintaining those standards, and the timing of their implementation.

In short, even if there is an ambiguity in the First Circuit's statement concerning "standards," it is not "crucial" because it is also clear that Congress did not expect immediate achievement of emission standards.

E. IN REJECTING EPA'S CONSTRUCTION OF SECTION 110, THE COURT OF APPEALS' HOLDING WOULD HAVE ADVERSE CONSEQUENCES NOT INTENDED BY CONGRESS.

The First Circuit's decision that Section 110(f) is the exclusive procedure for variances in the post-attainment period has been criticized as providing "a compelling argument against state adoption of regional emission limitations stricter than those required for attainment and maintenance of national [ambient air] standards." Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M. L. Rev. 324, 337 (1973). That criticism is equally true of the court of appeals' decision in this case concerning the pre-attainment period. Moreover, the court's construction of Section 110, if it had been adopted by EPA at the outset, would also have tended to deter states from adopting deadlines for the requirements of their plans earlier than the mid-1975 attainment deadlines (see pp. 29–30, *supra*). Since states like Georgia, which chose to make various requirements effective early, may have obtained the necessary support for such stringent measures only because a limited variance procedure was available, it would seem unfair to those states, and to

the thousands of sources operating pursuant to variances approved by EPA as revisions of state plans pursuant to Section 110(a)(3), to hold that they have acted in vain because Section 110(f) governs exclusively.

As one commentator has said, "it is difficult to imagine a more cumbersome and time-consuming variance mechanism than that under section 110(f) * * *." Comment, *supra,* 15 Wm. & M. L. Rev. at 334. While such a difficult procedural hurdle may well be justified with respect to efforts to postpone requirements of a state plan that will interfere with timely attainment or maintenance of the mandatory standards, there is no reason to suppose that Congress would have intended such a mechanism to govern all minor variances, particularly in the pre-attainment period.

Substantial delays would have been inevitable if EPA had been required itself to hold formal public hearings[26] and satisfy Section 110(f) as to all variances, of which there have been 800 in Georgia alone. Although EPA has as yet processed only a few requests for postponements under Section 110(f), experience thus far indicates that the disposition of each such request will be time-consuming and will absorb substantial amounts of EPA's limited resources.[27]

[26] EPA's regulations provide that hearings pursuant to Section 110(f) shall comply with the procedural requirements of 5 U.S.C. 554 for adjudications. See 38 Fed. Reg. 22025–22030, 27286–27287; 40 C.F.R. 51.33.

[27] For example, a request submitted by the Governor of West Virginia on June 13, 1973 (38 Fed. Reg. 27319, 30136), is still pending. Having held formal public hearings on the request in January, February and October 1974, EPA is awaiting a recommendation by the administrative law judge. A request submitted by the Governor of Nevada on August 29, 1973 (38 Fed. Reg. 34020), was not approved until July 10, 1974.

If the court of appeals' decision were sustained, EPA arguably would be required to hold formal public hearings as to many, if not all, of the 800 Georgia variances already submitted to EPA, even if they have already been the subject of public hearings held by the state. A similar result might also follow as to the balance of the 3000 variances submitted to EPA by other states in the Fifth Circuit alone.[28]

For many sources, particularly in the pre-attainment period, it may not be reasonably possible to comply with some requirement of a state plan by its effective date, because, for example, more time is needed to devise or procure the necessary control mechanisms. Yet, because of the one-year limitation and the substantive standards of Section 110(f), wholesale application of that provision to all requests for variances would have the result that many sources would be in violation and might face burdensome litigation, with the risk of being shut down, even though the variance sought would not interfere with attainment or maintenance of national standards. "Such a result appears unduly harsh, particularly in the absence of an explicit manifestation of congressional

[28] We do not think it necessary to resolve here the consequences of affirmance of the decision below for other plans not challenged in the Fifth Circuit (or elsewhere), or for the plans involved in the cases sustaining EPA's power to approve variances apart from Section 110(f). Those questions present potentially difficult legal and practical problems not before the Court in this case and not considered by the court below.

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intent on the question." Comment, *supra,* 15 Wm. & M. L. Rev. at 336. See, also Luneburg, *Federal-State Interaction under the Clean Air Amendments of 1970,* 14 B.C. Ind. & Comm. L. Rev. 637, 651, 653 (1973).

Because it would thus undesirably restrict the flexibility of the states and EPA in assuring the adoption and enforcement of control strategies for attaining and maintaining the national ambient air standards, the holding below should not be sustained. We submit that EPA's interpretation of the Clean Air Act as not requiring that all variances from requirements from state plans be subjected to the requirements of Section 110(f), and as permitting variances to be treated as revisions under Section 110(a) (3) if they will not interfere with timely attainment or maintenance of national standards, is not only consistent with the language, history and intent of the Act, but represents sound policy in the effort to achieve all of the Act's purposes. Accordingly, the decisions of the First, Second, Eighth and Ninth Circuits should be upheld, insofar as those courts have construed the Act as giving EPA authority to approve variances without resorting to Section 110(f), although we believe that EPA reached that conclusion through a preferable route.[29]

[29] Although these courts have stated that variances not subject to Section 110(f) must be approved by EPA, there is no explicit statutory basis for that requirement other than the revision authority of Section 110(a)(3), on which the courts did not rely. Moreover, under Section 110(a)(3), the states are obliged to provide an opportunity for a public hearing and EPA's approval is subject to judicial review (see p. 21, *supra*).

The holding below, moreover, would result in unwarranted constriction of state autonomy to determine how the national standards should be attained and implemented within each state. In providing for national air quality standards, Congress plainly meant to establish national ends to be achieved. But it did not intend comparably to nationalize decision-making about the means for achieving those ends—decisions whose economic, social and political dimensions are of particular concern to the states and localities most immediately affected by them.

Finally, there is no evidence—and the court below did not suggest—that EPA's treatment of variances has resulted in abuses. As noted, the state itself must first have provided an opportunity for a public hearing—as the Georgia law in issue here requires (see pp. 3–4, *supra,* n. 2).[30] Then, EPA publishes notice of requests for variances and invites comments. Nor does EPA grant rubber-stamp approval of such requests: there have been significant published denials.[31] And, although EPA has now approved thousands of variances pursuant to Section 110(a)(3), not one such approval has been successfully challenged in court.[32]

[30] Indeed, in some states requests for revisions are submitted by the governor, as requests for postponements must be. See *e.g.*, 39 Fed. Reg. 16348.

[31] See, *e.g.*, 37 Fed. Reg. 23837; 39 Fed. Reg. 16348, 30834.

[32] The reasonableness of the use being made of variances by the states and EPA is indicated by the fact that a great many variances have been for periods shorter than the entire period prior to the attainment deadline and many have already expired. *E.g.*, 39 Fed. Reg. 16348–16349, 35335–35343.

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CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
GERALD P. NORTON,
Assistant to the Solicitor General.
EDMUND B. CLARK,
LARRY A. BOGGS,
Attorneys.

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